No. 15446 (In Admiralty)

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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JOSEPH M. TRIHEY, Administrator of the Estate of Maria G. Muna, deceased, *et al.*,

*Appellant,*

*vs.*

TRANSOCEAN AIR LINES, INC., a corporation, *et al.*,

*Appellees.*

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**Appeal From the United States District Court for the Southern District of California, Central Division.**
**Hon. Thurmond Clarke, Judge.**

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## BRIEF OF APPELLEE, SLICK AIRWAYS, INC.

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DRYDEN, HARRINGTON, HORGAN & SWARTZ,
210 West Seventh Street,
Los Angeles 14, California,
*Attorneys for Appellee, Slick Airways, Inc.*



Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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### Preliminary.

Appellee, Slick Airways, Inc., will follow the method employed by Appellants in denominating the parties and making reference to the record.

### Jurisdictional Statement.

Slick agrees with Appellants that the District Court had jurisdiction of this cause by virtue of the Death on the High Seas Act, that it was tried as an admiralty matter, and that this Court has jurisdiction of the appeal.

## Statement of the Case.

Slick accepts the Statement of the Case presented by Appellants, except that it wishes to call attention to other pertinent facts.

Although Slick performed certain of the maintenance work under its contract with Transocean, the latter performed other servicing in connection with the aircraft. [R. 50.] The crash occurred on July 12, 1953, while the plane was westbound on a flight originating at Guam and destined for Oakland. The last time the plane was in the possession of Slick for the performance of maintenance work was July 7, 1953, when it replaced the number 4 engine. [R. 47-48.]

Thereafter, the aircraft was flown to Oakland, from where, on July 9th it was flown to Honolulu, then to Burbank and back to Oakland again. [R. 50-51.] There, it was serviced by Transocean employees. [R. 51.]

From Oakland, it was flown on July 10th to Honolulu with Captain Thomas Buckelew as pilot, where the aircraft was turned over to Captain Word, the pilot on the flight during which the plane crashed. [R. 685.] Captain Buckelew recalled no difficulties with the plane on that flight, and had there been anything unairworthy about the plane, he would have advised Captain Word. [R. 675, 685.]

From Honolulu the aircraft was flown to Guam, with a stop at Wake, and then back to Wake. At Wake, Harry Wood, crew chief, checked with the flight engineer as to possible malfunctioning or discrepancies—there were none. [RA. 703.] Wood then made a thorough inspection of the aircraft, both inside and out, and examined the aircraft's log. [R. 704-706.] He observed no squawks or

complaints on the log. [R. 706.] The only defect on the aircraft he observed was a worn tire, which would not affect the airworthiness of the plane. [R. 705.] The plane made a normal take-off from Wake. [R. 710.]

## Questions Presented.

As to Slick, the basic issues are as follows:

(1) When an aircraft crashes at sea from unknown causes, does *res ipsa loquitur* apply as to a company performing maintenance work on the aircraft, the last work being done several days before the crash, and during which interval servicing was performed by another agency and the aircraft flown many thousands of miles?

(2) Assuming such an inference could be drawn, was the District Court required to give a decision in accordance with it?

(3) Was the finding of the District Court that Slick was not negligent clearly wrong?

## Summary of Argument.

Only Points IB and IIIC in Appellants' Opening Brief relate to Appellee Slick. The contentions made under Point IV of Appellants' Brief, relate to Slick only insofar as they claim error with respect to findings against claims made under the points mentioned above.

In this Brief, Slick will show in Point I that *res ipsa loquitur* is not applicable to it in the present case; in Point II that even if it could be held applicable only a permissive inference is created which the District Court could disregard in view of other evidence; and in Point III that the findings made contrary to the evidence selected by Appellants are not clearly wrong.

## ARGUMENT.

### I.

### Res Ipsa Loquitur Is Inapplicable to Appellee Slick.

Slick will not comment extensively upon the applicability under any circumstance of the doctrine of *res ipsa loquitur* to an action under the Death on the High Seas Act, other than to call attention to the remark of Judge Holtzoff in *Smith v. Pennsylvania Cent. Airlines Co.* (D. C. Dist. Col., 1948), 76 Fed. Supp. 940, 943-944, that

> "It is true that the doctrine of *res ipsa loquitur* has never been applied to loss of life at sea."

Although counsel for Appellants has cited several decisions arising under other laws in which the doctrine of *res ipsa loquitur* has been applied as to a *common carrier* in control of the instrumentality at the time of the disaster, no case has been cited which applies the doctrine to a manufacturer or other person maintaining an aircraft when an unexplained crash occurred after the aircraft left the control of such person. The only cases directly considering this question which have come to the attention of counsel refuse to apply the doctrine.

Thus in *McCoy v. Stinson Aircraft Corp.* (1942) U. S. Aviation Reports 154, defendant aircraft company manufactured and sold a plane to the employer of plaintiff's intestate. It was later returned to defendant's factory where a gusset was welded on a wing. Thereafter, the plane was flown for about four months, with the exception of a five-week interval during that period, and crashed. Plaintiff relied upon specific acts of negligence, but in commenting upon the contention that *res ipsa loquitur* was applicable, the Canadian Court stated:

> "The plane was in use over a period of months and damage could happen which the defendant corpora-

> tion could not possibly know about, could not possibly prove in court, and consequently could not be held responsible for proving. In other words, it is not the sealed bottle element, nor the case in which the underwear undoubtedly remained in the same condition as when it left the factory; . . . How could that principle of responsibility . . . exist where the plane was subjected to constant use, over which the corporation had no control whatever? I think it must be clearly shown that the condition which resulted in the crash was a condition which could not have been introduced by anything which occurred between the delivery of the plane, or between the performing of the welding operation, and the accident, before that principle (with great respect to the argument I have heard) can be applied to a case such as this. The plaintiff falls far short of eliminating possible extraneous causes which might account for the defective condition which undoubtedly brought about the crash." (P. 157.)

Similarly, in *D'Aquilla v. Pryor* (S. D. N. Y., 1954), 122 Fed. Supp. 346, the District Court refused to apply *res ipsa loquitur* in favor of a passenger and against the owner of a rented plane where the evidence showed that it was rented in an airworthy condition.

The testimony of the employees servicing and flying the aircraft after it left the control of Slick as do the operational records, establish that the aircraft was airworthy after leaving Slick's control. Indeed, it would have to be to have negotiated the many thousands of miles it did prior to the crash.

Furthermore, servicing and maintenance was performed upon the aircraft after it left Slick's control. The District Court could properly refuse to draw the inference

or *res ipsa loquitur* in view of such affirmative evidence that others may have changed the condition of the aircraft.

*Cf. Danner v. Atkins* (1956), 47 Cal. 2d 327, 303 P. 2d 724.

As pointed out in *Zentz v. Coca Cola Bottling Co.* (1952), 39 Cal. 2d 436, 442-443, 247 P. 2d 344, the doctrine of *res ipsa loquitur* ordinarily is based upon probabilities, and is generally applicable when, because of the nature of the accident, it is more probable than not that the particular defendant charged was negligent. The requirements are satisfied when the instrumentality is under the control of such defendant at the time of the accident or if the defect in the instrumentality is of such a nature that it probably was caused by defendant's negligence when the instrumentality was under his control. In the latter instance, however, plaintiff must affirmatively establish that the condition of the instrumentality was not changed after it left defendant's control.

The Court in the *Zentz* case noted [p. 445] an exception in common carrier cases to the general rule that the probability must exist as to negligence of a specific defendant where a passenger is suing the carrier. The doctrine is allowed as against the common carrier, despite possible participation of other persons,

> "'. . . in view of the very high degree of care essential under the law on the part of a carrier of persons toward those who are its passengers, . . .' (39 Cal. 2d 445.)

It is this same duty of a high degree of care which causes the Courts to apply the doctrine of *res ipsa loquitur* in cases involving air line accidents, which often, such as in the present case, occur in circumstances under which it cannot be truly said the crash *probably* resulted from the negligence of anyone. For that reason, as pointed out by the District Court in *Smith v. Pennsylvania Cent. Airlines Corp.* (1948 D. C. Dist. Col.) 76 Fed. Supp. 940, *res ipsa loquitur* generally is held applicable to a common carrier in an unexplained airplane crash but not as to another person in control of the plane.

It should be an *a fortiori* case when defendant, such as Slick, was not acting as a common carrier, was not in control of the aircraft at the time of the crash, and there is no basis for concluding that the crash *probably* resulted from its negligence.

In all of the cases cited by Appellants for the proposition that *res ipsa loquitur* may be invoked against Slick, either evidence of the specific cause of the accident tended to establish the probability that the particular defendant charged was responsible, or the cases dealt with the unusual malpractice situation where the persons in attendance when plaintiff suffered injury are deemed to be in joint control.

## II.

## Even if Applicable, Res Ipsa Would Raise Only an Inference of Negligence Which the District Court Could Disregard in the Light of Other Evidence.

As pointed out in *Geotechnical Corp. of Delaware v. Pure Oil Co.* (C. A. 5th, 1952), 196 F. 2d 199:

> ". . . the doctrine as expounded by the Supreme Court, and to be applied in admiralty, has less potency than is given it in some courts. . . . The effect of them is to hold that the doctrine is not a rule of law, but a principle of evidence, useful to aid in making a *prima facie case,* but that it does not change ultimately the burden of proof on the plaintiff to show negligence in the defendant; and when the evidence is all in, the question still is whether all the evidence, in the light of common experience, reasonably shows that the defendant was negligent in some respect that caused the injury, though the particular negligence cannot be pointed out or directly proved."

In view of the testimony of the aircraft being airworthy after it left the control of Slick, and the total absence of any evidence of negligence on its part or that the crash probably resulted from its negligence, it is submitted that the District Judge was correct in refusing to draw such an inference.

## III.

## The Decision of the District Court Was Not Contrary to the Clear Preponderance of the Evidence.

It is, of course, well settled in this circuit that in admiralty the findings and conclusions of the District Judge will not be disturbed on appeal unless error is plain.

> *The Heranger* (C. C. A. 9th, 1939), 101 F. 2d 953, 957.

Appellants list three claimed specific acts of negligence as to Slick. The first is a claimed omitted test flight on the aircraft after replacement of the number four engine. The record shows, however, that a combined test flight and ferry flight was made after installation from Burbank to Oakland. [R. 49]. Such a flight would effect a much better test, being over a longer distance, then would a short hop around the field. Furthermore, it is difficult to establish any causal connection between such claimed omission and the crash. The test flight showed that the engine worked properly, and even if it had not, the plane was fully capable of operating on three engines, as recognized by Appellants on page 47 of their brief.

The second claim is that negligence is established from the auto pilot having 2100 hours on it at the time of the crash, rather than its being changed at 2,000. There is no showing that the unit was working improperly in any manner on the fatal flight, or that it in any way contributed to the crash. Furthermore, there is abundant testimony that in case of malfunctioning, the autopilot is easily disengaged or overpowered, and thus there is ample basis for the conclusion that the accident did not result from any defect in that unit.

The third ground alleged by appellants is that Slick faultily maintained the aircraft over a period of years and hence, apparently, they would infer that it faultily maintained the aircraft on the occasion in question so as to cause the crash. This contention is made after a selection of isolated items appearing on squawk sheets covering a period of a year. Appellants would draw an inference that maintenance was faulty because no records affirmatively showed some of the items were corrected, but it is more reasonable to infer that they were corrected, since the items would have reappeared on the squawk sheets if they were not.

Finally, it is apparent from the testimony of Appellants' own witness that the cause of the crash was not any mechanical difficulty, for Captain William Tracy, called as an expert, clearly testified that usually before an operational malfunction becomes critical, there is some preliminary warning sufficient to enable corrective steps to be taken. [R. 265.] As pointed out in Appellants' Brief (p. 19) the testimony of Appellants' own witnesses tended to show the accident occurred without opportunity to make the usual emergency preparations.

## Conclusion.

It is respectfully submitted that the judgment should be affirmed as to Appellee, Slick Airways, Inc.

Dryden, Harrington, Horgan & Swartz

By Vernon G. Foster,

*Attorneys for Appellee, Slick Airways, Inc.*